TAI KIM YEW & ORS

v.

SENTUL RAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-24-260-2003]
4 MARCH 2004

LAND LAW: *Housing developers - Damages for late delivery - Notice of intention to claim damages - Whether purchaser required to give notice under s. 56(3) Contracts Act 1950 - Doctrine of frustration - Whether developer could raise grounds of national economic crisis and dire financial position to invoke doctrine - Housing Developers (Control and Licensing) Regulations 1989, reg. 11, sch. H - Housing Development (Control and Licensing) Act 1966, s. 24*

CONTRACT: *Sale and purchase of property - Damages for late delivery - Notice of intention to claim damages - Whether purchaser required to give notice under s. 56(3) Contracts Act 1950 - Doctrine of frustration - Whether housing developer could raise grounds of national economic crisis and dire financial position to invoke doctrine - Housing Developers (Control and Licensing) Regulations 1989, reg. 11, sch. H - Housing Development (Control and Licensing) Act 1966, s. 24*

The plaintiffs were purchasers of condominium units. They claimed against the defendant developer, *inter alia*, for liquidated damages ('LAD') for delay in the delivery of vacant possession, and the right to set off the LAD against the balance of the purchase price for their respective units. The defendant claimed that the plaintiffs were not entitled to the LAD as they had not given notice of their intention to claim LAD as required by s. 56(3) of the Contracts Act 1950. Further, there was frustration of their respective sale and purchase agreements ('S&Ps') due to financial hardship brought about by the national economic crisis of 1997-1998.

Held (allowing the application):

[1] The right of the plaintiffs to LAD was governed by cl. 22(2) and cl. 24(2) of the S&Ps and the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Development (Control and Licensing) Act 1966. Section 56(3) of the Contracts Act 1950 had no relevance. The presence of the words "shall pay immediately" in both the

said clauses meant that the right to pay LAD was automatic once there was a delay by the defendant to hand over possession or to complete the common facilities. If the right to be paid was automatic, it followed that there was no obligation on the part of the plaintiffs to give any notice to the defendant. (p 316 c-e)

[2] Assuming that s. 56(3) of the Contracts Act 1950 applied to the S&Ps, nevertheless it did not apply to the facts herein. This was by reason of the words "If … the promisee accepts performance of the promise at any time other than that agreed," appearing in sub-s. 3 of s. 56, the obligation on the part of the plaintiffs to give notice of intention to claim LAD arose if the plaintiffs had indicated to the defendant that it was acceptable that the defendant fulfilled its promise at some other time other than the agreed date. However, the defendant adduced no such evidence. (p 318 e-f)

[3] The doctrine of frustration was not applicable. There was no evidence that it had become impossible to complete the condominium project. It was eventually completed after a very long delay. It was not sufficient for the defendant to merely refer to the national economic crises of 1997-1998 and the consequential dire financial position of its parent company to invoke the said doctrine. More should be established. (p 319 c-d)

Case(s) referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 ***(refd)***

Energoproject (M) Holdings v. PP [1996] 4 CLJ 571 HC ***(refd)***

Hariram Jayaram v. Sentul Raya Sdn Bhd [2002] 4 CLJ 796 HC ***(foll)***

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***

Kang Yoon Mook Xavier v. Insun Development Sdn Bhd [1995] 2 CLJ 471 HC ***(refd)***

Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335 ***(refd)***

Sakinas Sdn Bhd v. Siew Yik Hau [2002] 3 CLJ 275 HC ***(refd)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] 2 MLJ 31 ***(refd)***

The Eugenia [1964] 2 QB 226 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 56(3), 57(2)

Housing Development (Control and Licensing) Act 1966, s. 24

Housing Developers (Control and Licensing) Regulations 1989, reg. 11, sch H

Interpretation Acts 1948 and 1967, ss. 15, 17A

For the plaintiff - Nv Sree Harry; M/s Sri Ram & Co
For the defendant - Sylvia Cotter; M/s Logan Sabapathy & Co

Reported by Usha Thiagarajah

JUDGMENT

Mohd Hishamudin Yunus J:

By this originating summons action, the 15 plaintiffs, who are purchasers of apartments (condominium units) in a condominium in Kuala Lumpur known as Sang Suria Condominium, claim against the defendant company, a property developer from whom they had purchased the condominium units, for, *inter alia*:

(a) delivery of possession of the condominium units;

(b) liquidated damages (LAD) for the delay in the delivery of possession; and

(c) the right to set off the LAD against any claim for the payment of the balance of the purchase price by the defendant.

I have granted the order prayed for by the plaintiffs in the prayers in the originating summons.

The facts of the present case, in particular, on the issue of delay on the part of the defendant in handing over possession of the apartments and completion of the common facilities, are not disputed.

The respective sale and purchase agreements were entered into between the plaintiffs (individually) and the defendant at various dates in 1995, 1996 and 1997. The time stipulated by each of the sale and purchase agreements for the delivery of vacant possession of the respective condominium units and for the completion of the common facilities was 36 months from the date of the signing of the agreement. The actual dates (of delivery and completion) specified in the agreements range from 16 May 1998 to 4 March 2000, depending on the date of the signing of the particular sale and purchase agreement.

The defendant, however, failed to deliver vacant possession of the condominium units and to complete the common facilities within the stipulated time. Delivery of vacant possession and completion of the common facilities were only effected or performed long after the due date, in September 2002.

The plaintiffs claim for LAD from the defendant because of the delay. But the defendant refuses to acknowledge that the plaintiffs are entitled to LAD, invoking s. 56(3) of the Contracts Act 1950 and the doctrine of frustration.

The defendant's opposition to the plaintiffs' claims raises two questions of law, namely:

(a) whether s. 56(3) of the Contracts Act 1950 applies, and if so, whether this provision of the Contracts Act precludes the plaintiffs from claiming LAD; or, alternatively,

(b) whether there was a frustration of the sale and purchase agreements.

At the outset, let it be pointed out that, in the present case, the sale and purchase agreement entered into between each of the plaintiffs and the defendant is not an ordinary contract. It is not an ordinary contract in the sense that the parties, when they drew up the terms of the sale and purchase agreement, were not free to insert whatever terms they considered fit into the contract. For most of the terms of the contract, the parties had to incorporate into the sale and purchase agreement the terms as prescribed by reg. 11 and Schedule H of the Housing Developers (Control and Licensing) Regulations 1989 (the "Housing Developers Regulations"). Only in respect of certain terms, were parties freed to agree and to have them incorporated in the agreement; for example, terms pertaining to the price, the size of the condominium unit and the quality of the material and finishing.

The said reg. 11 of the Housing Developers Regulations stipulates as follows:

11. Contract of sale.

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

The Housing Developers Regulations is a subsidiary legislation made by the Minister of Housing and Local Government in the exercise of his powers pursuant to s. 24 of the Housing Development (Control and Licensing) Act 1966 (the "Housing Development Act").

Section 24 of the Housing Development Act provides as follows:

24. Powers to make regulations.

(1) Subject to this section, the Minister may make regulations for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the regulations may:

(a) …

…

(b) prescribe the form or forms of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise.

Among the prescribed terms incorporated in the sale and purchase agreements between the plaintiffs and the defendant are the following:

Clause 7. Time essence of contract.

Time shall be the essence of the contract in relation to all provisions of this Agreement.

Clause 22. Time for handing over of vacant possession.

(1) Vacant possession of the said Parcel to which water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to hand over vacant possession of the said parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten percentum (10%) per annum of the purchase price.

Clause 24. Completion of common facilities.

(1) The common facilities serving the said housing development shall be completed by the Vendor within thirty six (36) calendar months from the date of this Agreement.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten percentum (10%) per annum of the last twenty per centum (20%) of the purchase price.

The wordings in cl. 7, cl. 22(1) and (2), cl. 24(1) and (2) above are exactly similar as the wordings of cl. 7, cl. 22(1) and (2), and cl. 24(1) and (2) of the prescribed sale and purchase agreement in Schedule H of the Housing Developers Regulations.

It is to be observed that by the above cl. 7 of the standard sale and purchase agreement, entered into between the parties, time was expressed to have been the essence.

Since the sale and purchase agreements are not ordinary contracts but are substantially governed by reg. 11 and Schedule H of the Housing Developers Regulations, it follows therefore that cls. 7, 22 and 24 of the sale and purchase agreement are not mere terms of a contract: they are also statutory provisions since they are actually provisions of Schedule H of the Housing Developers Regulations that had been imposed by law upon the parties.

In this regard, it is to be noted that s. 15 of the Interpretation Acts 1948 and 1967 prescribes:

> **15. Schedules.**
>
> Every schedule (together with any note or table annexed thereto) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation.

It is, as said above, argued by the learned counsel for the defendant that the plaintiffs are not entitled to LAD by reason of s. 56(3) of the Contracts Act. Section 56 of the Contracts Act provides:

> **56. Effect of failure to perform at fixed time, in contract in which time is essential.**
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> **Effect of failure when time is not essential.**
>
> (2) If it was the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.
>
> **Effect of acceptance of performance at time other than that agreed upon.**
>
> (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so.

It is argued by the learned counsel for the defendant that since time is the essence of the contract, therefore, by reason of sub-s. (3) of s. 56, each of the plaintiffs, as the innocent party, in order to preserve his right to LAD under the sale and purchase agreement, must give the defendant, the defaulting party, notice of his intention to claim LAD for the delayed handing over of possession and completion of the common facilities. Counsel refers to *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 and *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89.

It is contended by the defendant that the plaintiffs (except the 5th, 11th and 12th plaintiffs) have failed to give the defendant such notice.

With respect, I am unable to accept this argument. In my judgment, I am in agreement with the learned counsel for the plaintiffs that the right of the plaintiffs to LAD is solely governed by cl. 22(2) and cl. 24(2) of the sale and purchase agreement entered into between each of the plaintiffs and the defendant and the Housing Developers Regulations (as well as the Housing Development Act); and that s. 56(3) of the Contracts Act has no relevance. The presence of the words "shall pay immediately" in both the clauses is very significant in the interpretation of both the clauses; and what the phrase means is that the right to be paid LAD is automatic once there was a delay by the developer to hand over possession or to complete the common facilities. The developer/defendant must pay the LAD to the purchaser at once, without further ado, once there was a delay. If the right to be paid is automatic, it follows then that there was no obligation on the part of the purchasers/plaintiffs to give any notice to the defendant. The phrase "shall pay immediately" would be meaningless if the defendant's argument that notice was required were to be accepted.

The same view was expressed by Abdul Malik Ishak J in *Hariram a/l Jayaram v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796. In this case cited, the facts are similar as the facts of the present case. In fact, the plaintiffs in that case were, like the plaintiffs in the present case, also purchasers of the same condominium as in the present case, that is, the Sang Suria Condominium in Kuala Lumpur; and the defendant/developer in that case is the same defendant/developer as in the present case: *Sentul Raya Sdn Bhd*. The learned judge in *Hariram*, in his judgment, held (at p. 824):

> … it must be emphasized that the word 'immediately' that appears in both cll 22(2) and 24(2) of the sale and purchase agreements which have been reproduced earlier would mean that the purchasers have the right to claim the liquidated ascertained damages without giving the requisite notices to the defendant under s. 56(3) of the Contracts Act 1950.

The proposition that this ought to be the proper interpretation to be given to the phrase "shall pay immediately" can be better appreciated if we were to consider the purpose behind the Housing Development Act, which is, to protect house buyers against the economically powerful developers. It is to be recalled that, as earlier pointed out in this judgment, the provisions of the sale and purchase agreement are special provisions in that they are governed by the Housing Developers Act. In *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31, Suffian LP delivering the judgment of the Federal Court said (at p. 34):

> It is common knowledge that in recent years, especially when the government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

In *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69, the Judicial Committee of the Privy Council held (at p. 71):

> This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses before or contemporaneously with or after completion of the houses.

The same sentiment has been echoed by the courts in the following cases:

(a) *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1983] 1 MLJ 335 (per VC George J (as he then was) at p. 341);

(b) *Kang Yoon Mook Xavier v. Insun Development Sdn Bhd* [1995] 2 CLJ 471 (per Abdul Malik Ishak J);

(c) *Energoproject (M) Holdings v. Public Prosecutor* [1996] 4 CLJ 571 (per KC Vohrah J (as he then was) at pp. 575-576) and

(d) *Hariram a/l Jayaram v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796 (per Abdul Malik Ishak J at pp. 810-811).

I wish to add that the interpretation that I (as well as the learned judge in Hariram) adopt in the present case is in accord with s. 17A of the Interpretation Acts 1948 and 1967 which prescribes the following principle of interpretation. This provision says:

17A. Regard to be had to the purpose of Act.

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in Act or not) shall be preferred to a construction that would not promote that purpose or object.

Therefore, to accept the defendant's argument is to make nonsense of the purpose of the Housing Development Act, besides offending s. 17A of the Interpretation Acts.

In my view, the cases relied upon by the defendant, namely, *Sim Chio Huat* and *Hock Huat Foundry* are inapplicable to the present case because these cases are in relation to normal building contracts, whereas the case that is now before me concerns a special contract, a standard sale and purchase agreement whose provisions are prescribed by the Housing Developers Regulations and the Housing Development Act. Moreover, in both the cases cited, the contract, unlike the contract in the present case, does not contain the imperative words "shall pay immediately".

Assuming that I am wrong in my above view, and that s. 56(3) of the Contracts Act does apply to the sale and purchase agreements, I would, nevertheless, hold that on the facts of the present case s. 56(3) does not apply. I so hold because, by reason of the words:

If … the promisee accepts performance of the promise at any time other than that agreed,

appearing in sub-s. (3), for the obligation on the part of the plaintiffs to give notice of intention to claim LAD to the defendant to arise, it must be shown that (and the burden to adduce such evidence is on the defendant) when the contracts became voidable, the plaintiffs have indicated to the defendant that it was acceptable to them if the defendant fulfilled its promise at some other time other than the agreed date (see *Sakinas Sdn Bhd v. Siew Yik Hau* [2002] 3 CLJ 275). But no such evidence was ever adduced by the defendant.

Now, it is further argued by the defendant, in the alternative, that by reason of:

(a) the "abnormal" delay in handing over possession; and that

(b) such delay was due to its dire financial position brought about by the 1997-1998 national economic crisis which was beyond its control,

there was a frustration of the contract.

In my judgment, this argument is also without merit. The common law doctrine of frustration is codified in our law in the form of s. 57(2) of the Contracts Act. The section states:

> **Contract to do act afterwards becoming impossible or unlawful.**
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

In the present case, there is no evidence that it had become impossible to complete the Sang Suria Condominium. On the contrary, the undisputed fact is that the Sang Suria Condominium project was eventually completed in September 2002, albeit after a very long delay. Hence, the question of frustration does not arise.

In any case, in order to successfully invoke the doctrine of frustration, it is not sufficient for the defendant to merely refer to the national economic crisis of 1997-1998 and the consequential dire financial position of its parent company, YTL Land and Development Berhad (see paras. 8 and 9 of the defendant's affidavit at encl. 5). More needs to be established. There had to be a radical change in circumstances. The circumstances under which the doctrine may be invoked have been clearly explained by Lord Denning MR in the English Court of Appeal case of *The Eugenia* [1964] 2 QB 226. In this case cited, the Suez Canal was blocked and a vessel had to go round by the Cape. The question arose whether the charterparty was frustrated. Lord Denning said:

> This means that once again we have had to consider the authorities on this vexed topic of frustration. But I think the position is now clear. It is simply this: if it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision – so much so that it would not be just in the new situation to hold them bound to its terms – then the contract is at an end.
>
> It was originally said that the doctrine of frustration was based on an implied term. In short, the parties, if they had foreseen the new situation, would have said to one another: "If that happens, of course, it is all over between us". But the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: "It is all over between us". They would have differed about what was to happen. Each would have sought to insert reservations or qualifications of one kind or another. Take this very case. The parties realized that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term.

…

> We are thus left with the simple test that a situation must arise which renders performance of the contract "a thing radically different from that which was undertaken by the contract", see *Davis Contractors Ltd v. Fareham Urban District Council* by Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the situation for which they provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as a matter of law.

Although I am prepared to take judicial notice of the national economic crisis of 1997-1998 and to accept that there was evidence of consequential financial hardship suffered by the defendant, nevertheless, I am not inclined to hold that, by reason of this economic crisis and the consequential financial hardship, a fundamentally different situation had arisen that rendered it impossible for the defendant to complete the condominium project, or to complete it with reasonable delay. Every businessman knows that there is a risk in any commercial venture that he undertakes and that economic conditions, be it international or national, is never static but always fluctuates; and he must be prepared for any eventuality, whether favourable or adverse to him. Therefore justice demands that he should not be allowed to use such an adverse eventuality as an excuse to evade performance of the contract. And it is worth repeating the following judicial policy as enunciated by Lord Denning in the case just cited:

> The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive.

[Order in terms (except for the 10th plaintiff who had withdrawn from the suit)]